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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KATRINA DRUMGO, Defendant and Appellant.	A128824 (Contra Costa County Super. Ct. No. 50904433)

Defendant Katrina Drumgo appeals the judgment imposed following her jury-trial convictions for felony resisting an executive officer by force or violence (Penal Code, section 69),[1] misdemeanor assault on a peace officer (§ 241, subd. (c)), and misdemeanor obstructing or delaying a peace officer (§ 148, subd. (a)(1)). Drumgo contends her conviction should be reversed for instructional error as well as erroneous admission of evidence. We reject Drumgo's claims of error; however, we agree with her contention that the trial court erred by denying her *Pitchess*[2] motion without conducting an in camera review of the arresting officer's personnel records. Accordingly, we

1 Further statutory references are to the Penal Code, unless otherwise noted.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. "The Legislature essentially codified *Pitchess* in 1978 when it enacted the statutory scheme . . . [¶] . . . set forth in Evidence Code sections 1043 through 1047 and Penal Code sections 832.5, 832.7 and 832.8." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227 & fn. 3 (*Mooc*).)

conditionally reverse the judgment and remand the matter with instructions, as set forth below.[3]

PROCEDURAL BACKGROUND

On May 13, 2009, the Contra Costa District Attorney (DA) filed an information accusing defendant of the following felony offenses: assault with a deadly weapon and force likely to produce great bodily injury upon a police officer (§ 245, subdivision (c)) (count one); threatening a peace officer (§ 71) (count two); and resisting an executive officer by force or violence (§ 69) (count three). The DA also accused defendant in count four of misdemeanor obstruction of a peace officer (§ 148, subdivision (a)(1)).

Defendant pleaded not guilty to the charges and the matter was set for trial. Before trial, defendant filed a *Pitchess* motion, seeking the production and in camera inspection by the court of all personnel records involving prior complaints against San Pablo Police Officer Kelli Richer. The court denied the motion without ordering production of records requested or an in camera inspection thereof.

The matter was subsequently tried before a jury in February 2010. The jury found defendant not guilty of felony assault with a deadly weapon, as charged in count one; however, the jury found defendant guilty of the lesser included offense of misdemeanor simple assault on a peace officer. The jury also found defendant not guilty of threatening a peace officer, as charged in count two. The jury found defendant guilty of felony resisting an officer with force or violence, as charged in count three, and misdemeanor obstructing an officer, as charged in count four.

On April 16, 2010, the trial court sentenced defendant to three years of court supervised probation. Defendant filed a timely notice of appeal on June 4, 2010.

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[3] "[T]he proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand" and grant any appropriate discovery. (*People v. Gaines* (2009) 46 Cal.4th 172, 180.)

FACTS

At trial, the prosecution presented testimony from the two arresting officers, San Pablo Police Officers Kelli Richer and David Neece. Officer Richer testified that around 8:30 p.m. on June 9, 2008, dispatch called for officers to respond to a report of domestic violence at 915 Lake Street in the City of San Pablo. Dispatch relayed that a female caller reported her husband held a knife to her throat and kicked her in the stomach. Upon parking at the address in question, Richer received a further dispatch that the female caller now reported police "weren't needed anymore." Richer nevertheless decided to contact the caller because as an officer she is obligated to verify that the person who called police was uninjured and that no type of assault had occurred. As she approached the caller's home, Richer observed Officer David Neece talking with two women at the bottom of the exterior stairway leading up to the front door of the home. These women told the officers "there was physical fighting going on inside." The door to the home was open. From inside the home, Richer could hear the sounds of a male and a female yelling and screaming at each other and a baby crying. Richer and Neece walked up the stairs and approached the front door, announcing themselves by calling into the home, "San Pablo Police Department, come on out." Just then, a woman ran out of the home. This woman told the officers that Tony was inside fighting with Katrina, specifically, "Tony was inside beating her ass." She also told the officers that there were children inside the home.

After the officers announced themselves and ordered people to come out, the arguing stopped and all Officer Richer could hear was a baby crying, then the crying stopped and the home fell silent. Richer and Neece entered the home and began to climb the interior stairs to the living area. They announced their presence as they went. At the top of this first interior staircase is an open living room/kitchen area and another staircase leading to the upper level of the home. Defendant was standing on a small landing on the stairs to the upper level, about five steps up from the living area. A small child was standing by her side crying. Defendant was yelling and shouting obscenities at the officers to "get the fuck out of my house. You can't come in here. You don't have a

warrant." Richer tried to persuade defendant to come off the stairs while Neece conducted a sweep of the living room/kitchen area. Neece reported back to Richer that he found no one present but the back door had been kicked in.

Richer began to move up the stairs towards defendant, telling her in a sterner tone of voice that she had to come off the stairs. As Richer came towards defendant, defendant reached down and gathered the child up in her right arm. Defendant was yelling she was going to call her lawyer and began dialing into a cordless phone she was holding in her hand. Richer reached out and took hold of defendant's left arm, intending to guide defendant down the stairs. However, defendant jerked backwards violently and broke free of Richer's grasp. When defendant jerked backwards, the child she was holding slid from her grasp and fell onto the landing. Richer grabbed defendant's left arm again, and defendant struck her in the face with the telephone.

Defendant struck Richer just above the eye and Richer's head struck the wall of the staircase. The blow opened a gash above Richer's eye, which was bleeding profusely into her eyes, nose and mouth. Richer let go of defendant and fell down the stairs. Richer called in a "code three" for officer reinforcements as Neece struggled with defendant on the landing. Some family members came into the home at this point and took defendant's child into their care. After defendant was placed in handcuffs, Richer led her from the home and placed her in the back of a patrol car. Defendant was "screaming and cussing" while seated in the back of the patrol car. Defendant yelled at Richer, shouting, "Yeah, bitch, I clocked you in your fucking eye and I'll kill your ass, too."[4]

The defense case consisted of testimony from defendant's mother, who testified as a character witness, defendant's friend, Lynn Williams, who was outside the home when the officers arrived, and defendant. Defendant's mother testified that she raised

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[4] Officer Neece's testimony corroborated Officer Richer's testimony in all material respects. In addition, Neece testified that after defendant was placed in the patrol car, he and cover officers went back to the home and again announced themselves. At that point, a male who was subsequently identified as Tony Vonglilay came out voluntarily.

defendant in her home through high school and opined that defendant is not a violent person. Williams testified she visited defendant on the evening in question. Williams was in the living room with Tierra Hogan and RaNisha Hogan and heard defendant and her husband Tony arguing upstairs. At one point, defendant called downstairs and asked them to call the police. No one did. However, before leaving the home, Williams picked up the phone downstairs and heard defendant calling the police from a phone upstairs. About five or ten minutes later Williams heard defendant call the police again. Williams and the other women left the home because they didn't want to listen to defendant and her husband arguing. All three were outside when the police arrived but did not talk to the officers. Nobody told the officers what was happening in the home. However, Williams told the officers "they better go inside." During the time Williams was outside she could not hear any sounds of arguing from inside the home, but after the officers went inside she heard defendant yelling.

Defendant testified that on the evening in question she and her husband Tony had an argument. At one point, Tony gave her his house key and went outside. Defendant locked the back door. Tony kicked the back door in and reentered the home. Defendant and Tony went upstairs and started arguing again. Tony began "kicking and punching" her and she called the police. Tony then left the home.

Defendant called the police back to report she no longer required assistance. When defendant heard the police announce themselves, she was standing on the interior stairs to the upper level of the home. She went back upstairs to fetch her son from the bedroom and started back downstairs, carrying her infant son on her hip. While standing on the landing above the living area, she told the police officers, "Tony isn't here anymore, . . . I don't need you anymore." Defendant grew angry with the officers because they were not listening to her; she was yelling that she had rights and telling them to leave. Defendant had a phone in her hand.

As Officer Richler came towards her, defendant turned to go back upstairs. Richler grabbed defendant's arm and yanked so hard that defendant fell and dropped her child. Richler grabbed defendant's arm again and twisted it. Defendant felt like she was

being attacked so she struck Richer with the phone. Defendant fell and Officer Neece grabbed her by the ankles as she lay face downwards. Neece dragged her downstairs into the living area and down the next flight of stairs to the front door. At the bottom of the stairs at the entrance to the home, Neece lifted defendant up, handcuffed her and placed her in the back of a patrol car. Minutes later, Officer Richer came down to the patrol car and "was walking back and forth at the car laughing." Defendant called Richer "a bitch" but did not threaten her.

On cross-examination, defendant stated that before police arrived her husband brandished a box-cutter knife at her. Defendant was scared because Tony threatened to kill her. She called the police because it was an emergency situation.

DISCUSSION

A. Jury Instructions

Defendant contends her convictions must be reversed because the jury instructions given by the trial court were deficient and improper in several respects. Defendant's contentions, which we discuss below, all relate to the court's instructions regarding lawful performance of duty by a peace officer.[5]

1. Lawfulness of Officer Conduct

Defendant contends that the trial court failed to instruct the jury on the Fourth Amendment principles governing the legality of the officers' warrantless entry into her home and their attempt to search the upper level of the home. In this regard, defendant asserts that after the officers entered the home and saw she was unharmed, "their only reason to insist on searching upstairs over appellant's objection was the need to render emergency aid to anyone who might have been injured upstairs." Thus, according to defendant, the trial court erred by failing to instruct the jury sua sponte on the emergency aid exception to the Fourth Amendment's warrant requirement.[6]

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[5] The court gave a modified version of CALCRIM 2670.

[6] The high court acknowledged the emergency aid exception to the Fourth Amendment's warrant requirement in *Brigham City, Utah v. Stuart et al.* (2006) 547 U.S.

Respondent argues that defendant has forfeited the issue because she failed to request an instruction on the emergency aid exception.[7] We agree. Under governing case law, defendant was required to request amplification or clarification of the instruction on the lawfulness of the officers' entry into the home and her failure to do so forfeits this claim on appeal. (*People v. Sanders* (1995) 11 Cal.4th 475, 533 [" '[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation]"]; see also *People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["[D]efendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions"].)

However, even considered on the merits, defendant's contention fails. The trial court has a duty to "instruct on the general principles of law relevant to the issues raised by the evidence. [Citations] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation]" (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) In this case, the trial court's instructions fully apprised the jury on the law pertaining to the circumstances under which an officer could lawfully enter a home without a warrant and effectuate an arrest. Specifically, the court instructed the jury: "In order for an officer to enter a home to arrest someone without a warrant: [¶] 1. The officer must have probable cause to believe that the person to be arrested

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398, 403 ["law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury"], as did the California Supreme Court in *People v. Troyer* (2011) 51 Cal.4th 599, 607 [emergency aid exception to the warrant requirement applies where "there was an objectively reasonable basis for believing that an occupant was seriously injured or threatened with such injury"].

[7] Defense counsel did not argue at trial that the officers had no right to conduct a sweep of the upstairs level of the home. Rather, defense counsel argued that there were no exigent circumstances justifying police entry into the home, that the officers used excessive force against defendant, causing her to drop her child, and defendant acted in self-defense of herself and her child when she struck the officer.

committed a crime and is in the home; [¶] AND [¶] 2. Exigent circumstances require the officer to enter the home without a warrant. [¶] The term exigent circumstances describes an emergency situation that requires swift action to prevent (1) imminent danger to life or serious damage to property, or (2) the imminent escape of a suspect or destruction of evidence." No more was required by way of instruction on this point.

We also reject defendant's assertion that the court's instruction was erroneous because it describes a warrantless entry for purposes of effectuating an arrest and the officers did not testify they wanted to go upstairs in order to effectuate an arrest. First, the officers testified that upon entry they had information that defendant had been beaten and threatened with a knife by her husband and there was reason to believe he was still on the premises. Also, there was ample testimony from the officers regarding why, under the circumstances, it was necessary to conduct a sweep of the upper level of the home. For example, Officer Richer testified as follows: "We hear someone outside arguing, sounds like a fight, we get a call about a fight and a knife is mentioned, it's our job to go in and make sure that no one is being . . . held hostage or hurt or injured. . . ."

In all events, defendant's argument is legally erroneous. Patently, to convict defendant the jury must have found that exigent circumstances justified the officers' warrantless entry into the home. Because the officers' entry into the home was lawful, no separate justification under the emergency aid exception was necessary. Moreover, defendant provides no authority in support of her assertion that when police officers enter an home under exigent circumstances, they may only conduct a partial protective sweep.[8]

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[8] Accordingly, we reject defendant's assertion that the court should have instructed the jury to measure the legality of the defendant's conduct "at two different times"—first, when they entered the home and, second, when they attempted to go upstairs. We also reject defendant's contention that the instruction at issue was erroneous because in modifying the instruction the trial court used language from *People v. Ray* (1999) 21 Cal.4th 464 (*Ray*). In this regard, defendant asserts that a "community caretaking exception" (*id.* at p. 471) to the warrant requirement crafted by the plurality in *Ray* was based on the subjective perceptions of the officer, and this subjective standard has subsequently been repudiated by the high court in *Brigham City, supra*, 547 U.S. 398. Defendant's contention is off the mark. The language the trial court incorporated from

In sum, we conclude defendant has failed to show the trial court's instruction governing the officers' entry into the home is legally deficient and reject her contention that the court should have instructed sua sponte on the emergency aid exception to the warrant requirement.[9]

2. Assertion of Fourth Amendment Rights

Defendant also contends the trial court improperly refused her request for an instruction that defendant could not be convicted for asserting her Fourth Amendment rights, relying on *People v. Wetzel* (1974) 11 Cal.3d 104 (*Wetzel*). This contention is meritless.

In *Wetzel*, defendant contended she was unlawfully arrested for obstructing an officer in the performance of his duties, in violation of section 148, after "passively assert[ing] a constitutional right" to refuse the police permission to enter her home, without a warrant, while they were in hot pursuit of a juvenile burglary suspect. (*Wetzel, supra,* 11 Cal.3d at pp. 106-107.) Stating that "the critical issue . . . is whether the officers were in fact obstructed in carrying out their right to enter without a warrant" in hot pursuit of a criminal suspect, the court noted that "at no time prior to defendant's arrest did the officers actually attempt or state that they intended to make such an entry. Nor is there any substantial evidence, which would support a conclusion that had the officers attempted to exercise their right to enter because they were in hot pursuit,

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Ray was *not* relevant to the lawfulness of the officers' entry into the home; the court's instructions on that point properly describe an objective standard. Rather, the court relied on language from *Ray* to modify the section of the standard CALCRIM 2670 describing how "Special Rules Control the Use of Force." Specifically, the trial court added that a peace officer investigating the possible commission of a crime may use reasonable force "to exercise control over potential witnesses, bystanders, and spectators in the immediate area of the investigation." Defendant cites no authority, and we have found none, showing this is an improper statement of the law.

[9] Thus, because the instruction given was appropriately tailored to whether the officers' entry was lawful under the facts presented, we need not address defendant's contention that trial counsel's failure to request a pinpoint instruction on the emergency aid exception amounted to ineffective assistance of counsel.

defendant would have physically resisted. Defendant's entire course of conduct was *directed to refusal of consent, and nothing more*." (*Id.* at p. 108-109, fn. omitted [italics added].) On these facts, the court held that defendant "had the right to withhold consent to enter" even if her insistence on a warrant was not well founded, and "as long as entry was not sought on any other ground than with her consent she committed no impropriety and certainly not a violation of section 148." (*Id.* at p. 110.)

Wetzel is distinguishable on its facts. Here, unlike in *Wetzel*, the officers had already *lawfully* entered the home under exigent circumstances when they encountered defendant on the stairs to the upper level of the home and ordered (not asked) her to come downstairs. Further, *Wetzel* does not suggest the Fourth Amendment confers a right to refuse to obey reasonable police commands issued during a lawful search in progress. Moreover, defendant's conduct went far beyond the passive refusal to consent to police entry found lawful in *Wetzel*; here, by contrast, defendant refused to obey reasonable police commands, wrenched violently away from the officer when the officer attempted to lead her down the stairs and struck the officer in the face with a telephone. In sum, the trial court was not obliged to instruct the jury pursuant to *Wetzel.*

3. Reasonable and Excessive Force

The trial court instructed the jury according to CALCRIM 2670 regarding the use of force. CALCRIM 2670 states that a "peace officer is not lawfully performing his or her duties if he or she is . . . using unreasonable or excessive force when making or attempting to make an otherwise lawful . . . detention." CALCRIM 2670 does not define what constitutes *unreasonable or excessive force* by the officer.[10]

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[10] Conversely, however, CALCRIM 2670 defines what constitutes "reasonable force" by a potential detainee, such as defendant, in protecting herself from an officer's use of unreasonable or excessive force. Specifically, the instruction states: "If a peace officer uses unreasonable or excessive force while arresting or attempting to arrest or detaining or attempting to detain a person, that person may lawfully use reasonable force to defend himself or herself. [¶] A person being arrested uses reasonable force when he or she: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive

Defendant contends the instructions given on the officers' use of force failed to define the meaning of unreasonable and excessive force. Defendant asserts that without "further explanation of excessive force, the jury was left with no standard beyond reasonableness to decide wither the officers used excessive force" in moving her off the staircase. We find no reversible error on this point.

First, defendant has forfeited this contention by failing to ask the trial court to add clarifying language regarding excessive force. (*People v. Sanders, supra,* 11 Cal.4th at p. 533 [" '[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation]"].) In all events, defendant's contention fails on the merits because even assuming error, no prejudice could have ensued from the instruction's failure to amplify on the nature of unreasonable or excessive force. By convicting defendant, the jury either believed the officers' testimony and found no use of unreasonable or excessive force, or, alternatively, credited defendant's testimony that Officer Richer used unreasonable or excessive force but concluded that defendant used more force than necessary to protect herself and her child from Officer Richer's use of excessive force. Accordingly, on this record, no reversal is warranted on account of CALCRIM 2670's failure to define unreasonable or excessive force by a peace officer.

B. Officer Testimony

The trial court admitted, over defendant's objections, officer testimony about their legal duties in responding to reports of domestic violence. For example, defendant notes that in regard to use of force, Officer Richer was permitted to testify that she had a legal responsibility to get defendant off the staircase even if it meant placing defendant in handcuffs.[11] Defendant also notes that Officer Neece was permitted to testify that "in

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force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection."

[11] At this point in her testimony, Officer Richer was describing her training and experience in use of force; in pertinent part, she stated: "[B]eing a police officer people

exigent circumstances, it's our job to make sure that no one is hurt or injured and that supersedes any kind of warrant." Defendant contends the trial court erred in admitting such testimony by the officers because it allowed the officers to define the law governing the facts of the case. Here again, we find no reversible error.

Even if the trial court erred in overruling defendant's objections to the challenged testimony, given the court's instructions we find no prejudice ensued from the failure to sustain defendant's objections. In this regard, the trial court repeatedly admonished the jury that the officer's testimony was not being received for the purpose of informing the jury regarding governing law and that the court would instruct the jury on the law.[12] Whereas defendant insists the court's repeated limiting instructions were "useless in the context of the officers' testimony because they were testifying about their training *in the law*," the court's explicit and repeated instruction that the court, not the officers, would instruct the jury on the law precluded the possibility that jury received the officers' testimony as instruction on the law of the case. (See *People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502 ["It is axiomatic that '[j]urors are . . . presumed to have followed the court's instructions.' "].)[13]

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are going to verbally assault you. . . . That's not the time and place to try to control somebody. People are going to vent, they are going to say things that are silly. [¶] [B]ut . . . if I have to make an arrest or . . . if I have a legal responsibility to do something like arrest somebody or in this case gain her cooperation, I will, you know, put her in handcuffs if that is what I have to do to check the . . . upper floor."

[12] For example, in overruling defense counsel's objection to Officer Neece's testimony that he did not need a warrant to enter the house as a legal conclusion, the trial court ruled: "Well, the issue of the legality of the officer's actions has been raised, so I'm going to permit the testimony. [¶] Again, the officer is not instructing you on the law, he is instructing you on the motivations for his conduct, the conclusions and reasons he is acting. I will be instructing you on the law. [¶] So you maintain that distinction, the officer can answer as to the reasons he took the actions he took."

[13] Further, defendant's reliance on *People v. Torres* (1995) 33 Cal.App.4th 37 is misplaced. In *Torres*, a police gang expert testified that the defendant's activities "collecting the rent" (where a member of a criminal street gang demands tribute on behalf of the gang from dealers selling drugs within the gang's territory) constituted robbery, as distinct from extortion. (*Id.* at p. 44.) The appellate court concluded the officer's

C. Pitchess Motion

1. Applicable Legal Standards

To obtain *Pitchess* discovery, the defendant must file a written motion describing " 'the type of records or information sought' [citation] and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records' [citation]. The affidavits may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information [citation].

"If the trial court concludes the defendant has fulfilled these prerequisites and made a showing of good cause, the custodian of records should bring to court all documents 'potentially relevant' to the defendant's motion. [Citation] The trial court 'shall examine the information in chambers' [citation], 'out of the presence and hearing of all persons except the person authorized [to possess the records] and such other persons [the custodian of records] is willing to have present' [citations]. Subject to statutory exceptions and limitations, . . . the trial court should then disclose to the defendant 'such information [that] is relevant to the subject matter involved in the pending litigation.' [Citation]." (*Mooc, supra,* 26 Cal.4th at p. 1226.)

The statutory scheme embodying *Pitchess* procedures (see fn. 2, *ante*) was designed to strike a "fair and workable balance" between "the need of criminal defendants for 'all relevant and reasonably accessible information' [citation], and the legitimate concerns of peace officers to shield from disclosure confidential information

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testimony was inadmissible because a witness may not express an opinion as to the definition of the crime, an opinion as to the guilt or innocence of the defendant, or an opinion as to whether a crime has been committed. (*Id.* at pp. 45-48.) Here, the officers testified about their training and experience in responding to reports of domestic violence; unlike in *Torres, supra,* here the officers did not opine on the definition of the charged offenses, defendant's guilt or innocence or whether a crime had been committed.

not essential to an effective defense or otherwise obtainable from other non-privileged sources." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 93-94.) In this regard, the "relatively low threshold for a showing of good cause [triggering in camera review] is tempered, in turn, by the specific exclusions, in camera review procedures, and exacting standards for disclosure." (*Id.* at p. 94; see also *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10 ["relatively low threshold for discovery . . . is offset . . . by . . . protective provisions" embodied in the statutory scheme].) To meet the relatively low threshold required to show "good cause for in-chambers review of an officer's personnel records," the trial court examines whether the defense has "shown a logical connection between the charges and the proposed defense" and whether "the requested *Pitchess* discovery support[s] the proposed defense, or is [] likely to lead to information that would support the proposed defense." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011 at pp. 1026-1027.) The standard of review for an order denying a *Pitchess* motion is abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.)

2. Analysis

Defendant contends that she demonstrated good cause for in-chambers review of Officer Richer's personnel records and thus the trial court erred in denying her pretrial *Pitchess* motion without ordering production of the records for in camera review. We agree.

In her *Pitchess* motion, defendant sought a court order directing the San Pablo Police Department to produce any records pertaining to Officer Richer of "prior or current internal and civilian complaints, investigations or reports in which allegations of corruption, illegal arrests and/or searches, the fabrication of charges and/or evidence, acts of harassment or malicious conduct against citizens, dishonesty and improper tactics such as conduct unbecoming an officer, neglect of duty, false arrest, and any conduct amounting to moral turpitude." In her memorandum and declaration in support of the motion, defendant described her version of the police officers' entry into her home and the events occurring thereafter. Specifically, defendant stated she called the police to cancel her request for officer assistance; despite this, the police insisted on entering her

home, refused her repeated requests that they leave, and then ignored her when she denied them permission to go upstairs. In addition, defendant stated Officer Richer grabbed her while defendant was holding her child, causing both defendant and the child to fall down the stairs, and defendant swung her arm to avoid any further harm being inflicted upon herself or her child by Officer Richer. Finally, defendant avers Officer Richer did not report the incident accurately or honestly and testified falsely at the preliminary hearing regarding the events in question, and that Officer Richer's actions in grabbing defendant while defendant was holding her infant child were unlawful and constituted excessive use of force.

Defendant set forth in her *Pitchess* motion and accompanying declaration a plausible factual scenario that would support defense claims of unlawful entry and excessive use of force by the arresting officer. (See *Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71.) Additionally, defendant has satisfied the materiality requirement by showing that the information sought could lead to evidence potentially admissible at trial regarding the police officers' credibility. (*Ibid.*) In sum, defendant has met the "relatively low threshold" required for the discovery and in camera review of the personnel records sought in her *Pitchess* motion. (*City of Santa Cruz v. Municipal Court, supra,* 49 Cal.3d at p. 94.) Thus, we conclude the trial court abused its discretion by denying the *Pitchess* motion without conducting an in camera review of the personnel records requested.[14] Accordingly, the judgment is conditionally reversed and we remand the matter to the trial court so that it may conduct an in camera hearing on defendant's *Pitchess* motion under the following procedure: If the hearing reveals no discoverable

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[14] Nevertheless, we reject defendant's contention that pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, she is entitled to materials precluded under Evidence Code, section 1045, subdivision (b)(1), which provides: "In determining relevance, the court shall examine the information in chambers . . . and shall exclude from disclosure: [¶] (1) Information consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought." (*Ibid.*) In *City of Los Angeles v. Superior Court, supra,* 29 Cal.4th 1, the California Supreme Court held that the five-year limitation on discovery under *Pitchess* motions did not violate due process. (See *id.* at pp. 11-12.)

information in the officer's personnel files, we direct the trial court to reinstate the original judgment and sentence. However, if there is discoverable material in the officer's personnel files, the *Pitchess* motion shall be granted and the discoverable material turned over to defendant so that she may determine whether that material would have led to any relevant, admissible evidence that she could have presented at trial. If defendant is able to demonstrate that she was prejudiced by the earlier denial of her *Pitchess* motion, there should be a new trial. If defendant is unable to demonstrate prejudice, we direct the trial court to reinstate the judgment as of that date. (See *People v. Gaines, supra,* 46 Cal.4th at p. 181.) The trial court should also make a record of any *Pitchess* documents it reviewed in camera. (*Id.* at p. 180.)

DISPOSITION

The judgment is conditionally reversed and the matter is remanded for further proceedings consistent with the instructions set forth above.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.